TANJONG JAGA SDN. BHD.

v.

THE MINISTER OF LABOUR AND MANPOWER & ANOR.

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR CJ (MALAYA)
GEORGE SEAH SCJ
EUSOFFE ABDOOLCADER SCJ
[CIVIL APPEAL NO. 132 OF 1985]
27 AUGUST 1986

LABOUR LAW: *Refusal of High Court to grant order of certiorari to quash Minister of Labour's decision - Appeal - 3 grounds - Nature of appellant's business as a night-club render its employees ineligible for membership in the 2nd respondent - Failure to comply with provisions of para. 4(1)(c) of the Industrial Relations Regulations 1980 - Breach of the rules of natural justice - Eligibility of appellant's employees for membership in the 2nd respondent - Whether wholly devoid of any merit or substance.*

This was an appeal by the appellant against the refusal of the High Court to grant an order of *certiorari* to quash the 1st respondent's decision made on 3 April 1984 to the effect that the appellant which operates a night-club do accord recognition to the 2nd respondent which is a trade union of employees in the hotel, bar and restaurant business in peninsular Malaysia to represent its employees other than those in the managerial, executive, confidential or security capacity. The appeal was based on 3 broad grounds namely:

(i) the nature of the business of the appellant as a night-club was such as to render its employees ineligible for membership in the 2nd respondent which it was contended could only represent workmen in the hotel, bar and restaurant business;

(ii) failure to comply with the provisions of para. 4(1)(c) of the Industrial Relations Regulations 1980; and

(iii) breach of the rules of natural justice.

Held:

[1] The first point taken for the appellant in relation to the eligibility of the appellant's employees for membership in the 2nd respondent was wholly devoid of any merit or substance whatsoever.

[2] The Registrar had acted fairly, properly and reasonably in the exercise of his broad discretion in the matter under s. 9(5) of the Industrial Relations Act 1967 ("the Act") and had taken all relevant matters into consideration and had sufficient evidence and material before him for the purposes of arriving at his decision to accord recognition to the 2nd respondent.

[3] Section 9(6) of the Act furthermore postulates a privative clause to the effect that the decision of the 1st respondent under sub-section (5) shall be final and shall not be questioned in any Court. There is no jurisdictional error of any kind whatsoever at all in this case.

[Appeal dismissed with costs.]

Cases referred to:

Pahang South Union Omnibus Co. Bhd. v. Minister of Labour & Manpower & Anor. [1981] CLJ (Rep) 74
Chief Constable of the North Wales Police v. Evans [1982] 1 WLR 1155
Council of Civil Service Unions & Ors. v. Minister for the Civil Service [1985] 1 AC 374
Merdeka University Berhad v. Government of Malaysia [1981] CLJ (Rep) 191
Regina v. Secretary of State for the Environment, Ex parte Norwich City Council [1982] 1 QB 808
Regina v. Secretary of State for the Environment, Ex parte Brent London Borough Council & Ors. [1983] 1 QB 593
Official Solicitor to the Supreme Court v. K. & Anor. [1965] AC 201
Board of Education v. Rice [1911] AC 179
Local Government Board v. Arlidge [1915] AC 120
Minister of Labour & Manpower & Anor. v. Paterson Candy (Malaysia) Sdn. Bhd. [1980] 2 MLJ 122
Mohamed Nordin bin Johan v. Attorney-General, Malaysia [1983] CLJ (Rep) 271
Hubli Electricity Company Limited v. Province of Bombay LR 76 IA 57
Regina v. Chief Registrar of Friendly Societies, Ex parte New Cross Building Society [1984] 1 QB 227
Regina v. The Staines Union [1893] 69 LT 714
Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223
Bromley London Borough Council v. Greater London Council & Anor. [1983] AC 768
Carter v. Bradbeer [1975] 1 WLR 1204; 3 All ER 158; 61 Cr App R.275
Cinnamond & Ors. v. British Airports Authority [1980] 1 WLR 582
South East Asia Firebricks case [1980] 2 MLJ 165
Spackman v. Plumstead Board of Works [1885] 10 App Cas 229
Wong Ah Suan v. Sarawak Electricity Supply Corp. [1982] CLJ (Rep) 50
Anisminic v. Foreign Compensation Commission [1969] 2 AC 147
Inchcape (M) Holdings Bhd. v. Gray [1985] CLJ (Rep) 132
Maradana Mosque Trustees v. Mahmud [1967] 1 AC 13
Malloch v. Aberdeen Corp. [1971] 1 WLR 1579

Legislation referred to:

Essential (Security Cases) Regulations 1975, reg. 2(2)
Industrial Relations Act 1967, ss. 9, 9(2), (3), (4), (4A), (4B), (4C), 9(4B) (b), (5), (6)
Industrial Relations Regulations 1980, reg. 4(1)(c)
Trade Unions Act 1959, s. 2(1), (2)
Public Health Act 1875 [UK], s. 299
Public Authorities Protection Act 1948, s. 2(b)

For the appellant - S. Kulasegaran (S.Navaratnam with him); M/s. Ranjit,Thomas & Kula
For the 1st respondent - P.M. Mahalingam, SFC
For the 2nd respondent - T. Thomas; M/s. Skrine & Co.

JUDGMENT

Eusoffe Abdoolcader SCJ:

The legitimacy of the institutional decision of the first respondent, the Minister of Labour and Manpower, in resolving a trade union recognition dispute statutorily entrusted to him under the provisions of s. 9(5) of the Industrial Relations Act 1967 ('the Act') has yet once again been brought into issue in this appeal before us against the refusal of the High Court to grant an order of *certiorari* to quash his decision made on 3 April 1984 to the effect that the appellant which operates a night-club under the style of Shangri-la Nite club do accord recognition to the second respondent which is a trade union of employees in the hotel, bar and restaurant business in peninsular Malaysia to represent its employees other than those employed in a managerial, executive, confidential or security capacity.

I should perhaps observe at this stage, as I did right at the very outset of the hearing in Court, that except for the matter of the eligibility of the appellant's employees for membership in the second respondent on the question whether the latter as a trade union enspheres such persons in the light of the nature of their employment, all the other matters put in issue in these proceedings were in fact raised and decided by the Federal Court in *Pahang South Union Omnibus Co. Bhd. v. Minister of Labour & Manpower & Anor*. [1981] CLJ (Rep) 74, with a wholesale transportation of the arguments taken from that to the present case even to the extent of resorting to the curious dichotomy of general as opposed to limited recognition of a trade union which is nowhere provided for, and so much so that the written submission Mr. Kulasegaran for the appellant has sought to put in these proceedings has a reference to the Transport Workers union of peninsular Malaysia instead *ex facie* to be so but says however there is, as he puts it, 'a world of difference' in the instant matter from *Pahang Omnibus* in view of the provisions of para. 4(1)(c), of the Industrial Relations Regulations 1980 ('the Regulations') which came into operation on 15 September 1980 concomitantly with the amendments effected to s. 9 of the Act.

On 18 August 1983 the second respondent made a claim for recognition by the appellant under s. 9(2) of the Act in respect of its employees but the appellant disputed the fact that the majority of its employees were members of the second respondent and wrote to the director general of Industrial Relations asking for certain particulars of its employees in relation to this claim. The director general refused this request and in turn asked the appellant to submit a list of its employees which was duly sent. As there was no compliance with s. 9(3) of the Act the second respondent reported the matter in writing on 13 September 1983 under s. 9(4) to the director general who then referred it to the Registrar of Trade Unions pursuant to s. 9(4B) of the Act and para. 4(1)(c) of the Regulations for a membership check, and this apparently disclosed that 65.8% of the appellant's employees were within the scope of union representation by the second respondent as at 18 August 1983 which was the date of the claim for recognition. The appellant was then advised to recognise and to convey its decision to that effect to the second respondent within fourteen days failing which action would be taken under s. 9(4C) of the Act.

The appellant apparently was dissatisfied with the outcome of the membership check by the Registrar and carried out a survey of its own which allegedly showed that the second respondent did not in fact represent a majority of its employees. I should perhaps pause to observe immediately that no point was taken by or on behalf of the appellant then or at any subsequent stage before the director general, the Registrar or the first respondent as to the ineligibility of its employees to be members of the second respondent by virtue of the nature of their employment. The director general by a letter dated 16 January 1984 rejected the appellant's survey, reaffirmed the Registrar's findings and stated that if recognition was not accorded by 25 January 1984 he would notify the first respondent under s. 9(4C) of the Act. The matter was accordingly referred to the first respondent who gave his decision on 3 April 1984 under the provisions of s. 9(5) of the Act according recognition to the second respondent. The appellant then applied to the High Court for *certiorari* to quash the first respondent's decision, but this was refused on 14 March 1985.

The appeal before us was argued basically on three broad grounds, namely, (1) the nature of the business of the appellant as a night-club was such as to render its employees ineligible for membership in the second respondent which it was contended could only represent workmen in the hotel, bar and restaurant business; (2) the failure to comply with the provisions of para. 4(1)(c) of the regulations; and (3) breach of the rules of natural justice.

The argument advanced in this appeal primarily and substantially on a composite exposition of all three grounds revolved around the question of the failure of natural justice in the decision arrived at by the first respondent according recognition to the second respondent, and I must reiterate that all the points taken in this regard and the arguments advanced in support thereof were in fact a regurgitation of the very points raised and determined in *Pahang Omnibus.*

I think it might perhaps be just as well if at the outset I enter into a brief discourse on the function of judicial review and, as the crux of the appellant's case essentially centres on the issue of natural justice I also touch on the principles relating thereto pertinent to the instant matter. It is of considerable significance to bear in mind that judicial review is of the hearing and not of the decision. The House of Lords firmly restated this principle in *Chief Constable of the North Wales Police v. Evans* [1982] 1 WLR 1155 in holding that judicial review is concerned not with the decision but with the decision-making process, and that unless that restriction on the power of the Court is observed the Court will, under the guise of preventing the abuse of power, be itself guilty of usurping power. This exposition was cited with approval by Lord Fraser of Tullybelton in the House of Lords in *Council of Civil Service Unions & Ors. v. Minister for the Civil Service* [1985] 1 AC 374 (at p. 401). I would also refer to my judgment in *Pahang Omnibus* (at p. 78) in regard to the clear distinction between an appeal and judicial review and the essential scope and limitations of the latter.

On the matter of natural justice and the right to a hearing, the fundamental proposition about the content of the *audi alteram partem* rule has been stated time and again: it is variable. The rules are not inflexible principles and may vary in their content in the circumstances of the case and in their ambit in the context of their application [*Pahang Omnibus* (at p. 80) and the cases there-in cited]. I have elaborated on this in my judgment in *Merdeka University Berhad v. Government of Malaysia* [1981] CLJ (Rep) 191 (at pg. 212), affirmed by the Federal Court [1982] 2 MLJ 243 (at p. 252). In *Regina v. Secretary of State for the Environment, Ex parte Norwich City Council* [1982] 1 QB 808 May LJ, in the course of his judgment in the English Court of Appeal said (at p. 837-838):

> However, although the general principle that justice must not only be done but be seen to be done is so well known, it is not to be applied without further thought to the circumstances of any particular case. As Sachs LJ said in *In re Pergamon Press Ltd.* [1971] Ch. 388, 403:
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> > In the application of the concept of fair play, there must be real flexibility, so that very different situations may be met without producing procedures unsuitable to the object in hand. That need for flexibility has been emphasised in a number of authoritative passages in the judgments cited to this Court. In the forefront was that of Tucker LJ in *Russell v. Duke of Norfolk* [1949] 1 All ER 109, 118, and the general effect of his views has been once again echoed recently by Lord Guest, Lord Donovan and Lord Wilberforce in *Wiseman v. Borneman* [1971] AC 297, 311, 314 and 320. It is only too easy to frame a precise set of rules which may appear impeccable on paper and which may yet unduly hamper, lengthen and, indeed, perhaps even frustrate (see per Lord Reid in *Wiseman v. Borneman* at p. 308) the activities of those engaged in investigating or otherwise dealing with matters that fall within their proper sphere. In each case careful regard must be had to the scope of the proceeding, the source of its jurisdiction (statutory in the present case), the way in which it normally falls to be conducted and its objective.

In Regina v. Secretary of State for the Environment, Ex parte Brent London Borough Council & Ors. [1983] 1 QB 593 Ackner LJ said (at p. 642):

> It is not possible to lay down rigid rules as to when principles of natural justice are to apply: nor as to their scope and extent. Everything depends on the subject matter: *Reg. v. Gaming Board for Great Britain, Ex parte Benaim & Khaida* [1970] 2 QB 417, per Lord Denning MR at p.430. It is clear that different classes of cases were recognised in *Ridge v. Baldwin* [1964] AC 40, see per Lord Reid, at p. 72.

In *Regina v. Secretary of State for the Home Department, Ex parte Gunnell*, The Times, 3 November 1983, the rules of natural justice were held not to be applicable to the revocation of a prisoner's parole. Every case must accordingly fall somewhere on a line of a continuum ranging from minimum standards to rigorous standards approaching the normal procedures of the superior Courts, although the superior Courts will not always be required to observe the higher standards [as for example, in *Official Solicitor to the Supreme Court v. K. & Anor.* [1965] AC 201].

The modern concept stems from the advent of the duty to act fairly as one of the prime functions of judicial control of executive and administrative determinations to ensure that the fundamentals of fair play have been preserved. Before this concept developed and crystallized however recourse was usually had to the judgment of Lord Loreburn LC in *Board of Education v. Rice* [1911] AC 179 (at p. 182), and indeed in this appeal Mr. Kulasegaran specifically relies on the passage in question. The process of decision in English administrative law so described was put to the test of natural justice in the leading case of *Local Government Board v. Arlidge* [1915] AC 120 in which a houseowner applied to the Court to quash the decision of the board dismissing an appeal after having held the required statutory inquiry against a closing order by local authority in respect of his house as being unfit for human habitation, claiming that it was contrary to natural justice on the grounds that he was entitled to be heard orally by the deciding officer whose identity was not disclosed in the order of the Board and that he was entitled to see the report of the inspector who had conducted the public local enquiry on behalf of the board. The House of Lords rejected the claim of the house owner and so far from disapproving the procedure adopted by the department, regarded it as complying with all the essentials of justice and as having done complete justice to the houseowner. Viscount Haldane LC said (at p. 132):

> Such a body as the Local Government Board has the duty of enforcing obligations on the individual which are imposed in the interests of the community. Its character is that of an organisation with executive functions. In this it resembles other great departments of the state. When, however, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently.

Against the backdrop of the principles I have adumbrated I now turn to deal with the first point taken for the appellant, *scilicet*, the ineligibility of the appellant's employees for membership in the second respondent by reason of the nature of the business carried on by the appellant. A trade union is defined in s. 2(1) of the Trade Unions Act 1959 to mean, so far as relevant for present purposes, any association or combination of workmen within any particular trade, occupation or industry or within any similar trades, occupations or industries, and subsection (2) of s. 2 enacts that for the purposes of the definition of 'trade union' in subsection (1) and the registration of a trade union, 'similar' means similar in the opinion of the Registrar. It is abundantly clear therefore that the Registrar determines the scope and ambit of trade union membership in relation to the nature of the business of the employer and this is evident from the decision of the Federal Court in *Minister of Labour & Manpower & Anor. v. Paterson Candy (Malaysia) Sdn. Bhd.* [1980] 2 MLJ 122. The direct nexus of this power entrusted to the Registrar to the Act appears in the definition of 'trade union' in

s. 2 of the Act to mean any trade union registered under any law relating to the registration of trade unions and also in the provisions of s. 9(4B)(b) of the Act which empower the director general in carrying out his functions under subsection (4A) of s. 9 thereof to refer to the Registrar for his decision any question on the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom recognition is sought to be accorded, and this paragraph further provides that the performance of duties and functiuons by the Registrar under this paragraph shall be deemed to be a performance of his duties and functions under the written law relating to the registration of trade unions.

In *Mohamed Nordin bin Johan v. Attorney-General, Malaysia* [1983] CLJ (Rep) 271 the question in issue was whether the exercise by the Attorney-General of his power under reg. 2(2) of the Essential (Security Cases) Regulations 1975 which empowers him to issue a certificate that the commission of any offence against any written law in his opinion affects the security of the Federation can be challenged. The Federal Court held that this regulation attracts the pure judgment of the Attorney-General which cannot be subjected to an objective test and is not accordingly amenable to judicial review, citing with approval and following the decision of the Privy Council in *Hubli Electricity Company Limited v. Province of Bombay* LR 76 IA 57 in which it was held on the construction of the particular statutory provision in question that it was the subjective opinion of the government which was relevant and not the grounds on which the opinion was based.

In the matter before us there was no *lis* and no adversary and it was the Registrar's subjective judgment based on his own observation and opinion as disclosed in his affidavit that was relevant and pertinent. A highly instructive authority in relation to this aspect is the decision of the English Court of Appeal in *Regina v. Chief Registrar of Friendly Societies, Ex parte New Cross Building Society* [1984] 1 QB 227. I would refer to the judgment of Sir John Donaldson MR (at p. 256) and of Griffiths LJ who said (at p. 260) that the Court must take broad view of the decision and not allow itself to be bogged down in minutiae, or led into the error of taking over the role of a fact finding tribunal, and indeed a statement to this very effect was made in *Pahang Omnibus* (at p. 78). And again (at p. 264) Griffiths LJ said:

> In making his inquires the registrar is not conducting an adversarial inquiry in which two sides lay out before him all the evidence they wish to take into account. The registrar makes his own inquires and he has extensive powers and a large department at his disposal to do so. The registrar is engaged in an inquisitorial, not adversarial process." I think it would also be useful to quote this passage from the judgment of Slade LJ (at p. 273):
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> > In my opinion, however, these are the limits of the powers of the Court to interfere. It is not at liberty merely to substitute its own opinion for that of the chief registrar (see the *Tameside* case *[Secretary of State for Education & Science v. Tameside Metropolitan Borough Council* [1977] AC 1014] at p. 1064, per Lord Diplock); nor is it at liberty to act as an appellate Court from the chief registrar's decision on questions of fact. If the society were in a position to prove by compelling evidence that a particular finding of crucial fact by the chief registrar was clearly wrong, this might give the Court power to intervene. Subject to this, however, on this application for judicial review, the society is not, in my opinion, entitled to call on the chief registrar to justify his findings of fact by evidence nor to expect the Court to reverse findings of fact made by the chief registrar, for the purpose of upsetting the exercise of his discretionary powers.

Mr. Kulasegaran however submits that it was incumbent on the Registrar to make due inquiry by considering evidence from both sides - virtually treating the matter as a *lis inter partes* - before arriving at a decision on the capacity of the second respondent in relation to representation of the appellant's employees in the light of the business involved. There is no provision or requirement for due inquiry as such and all that was necessary was a fair and reasonable decision arrived at by the Registrar in the exercise of his discretion. Even if there was a specific statutory requirement for due inquiry, it is interesting to note the decision in *Regina v. The Staines Union* [1893] 69 LT 714. Section 299 of the Public Health Act 1875 empowered the Local Government Board to enforce the performance of its duty to provide sufficient sewers by a defaulting local authority, where the Board was satisfied, after due inquiry, that the authority had been guilty of the alleged default. The defaulting authority in that case, which was being proceeded against by way of *mandamus*, contended that the Board had not in fact held the 'due enquiry' required by the statute, for the hearing officer had refused to allow certain meterial evidence tendered by the authority. The Court, however, rejected this contention, Cave J stating (at p. 716):

> The objection raised was, that there had not been due inquiry, but I have very grave doubt whether we have anything to do with the question of due inquiry. The Local Government Board - and not this Court - had to decide. They had to be satisfied, and though, no doubt, they were to be satisfied after 'due inquiry'. these words did not mean that the Queen's Bench Division had to exercise its ordinary jurisdiction, or rather an appeal jurisdiction, on what was 'due inquiry'. I have always protested against the attempt of the Courts to take part in jurisdiction which they had nothing whatever to do with. So long as the question is one of law it is quite proper that the Courts should pronounce an opinion; but what we are now asked to do is to see whether there has been any inquiry in point of law. If it could be shown that there was no inquiry at all, there might be some ground for refusing this application for a *mandamus*. But it was admitted that there had been an inquiry, and an inquiry which had satisfied the Local Government Board.

In exercising his functions in this regard, the Registrar had an unfettered discretion which was subject to a duty to act responsibly in the *Wednesbury* sense [*Associated Provincial Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223], that is to say, if a decision-making body comes to its decision on no evidence or comes to an unreasonable finding - so unreasonable that a reasonable person would not have come to it - then the Courts will interfere. The *Wednesbury* principle refers in effect, in the words of Lord Diplock in *Bromley London Borough Council v. Greater London Council & Anor.* [1983] AC 768 (at p. 821), to decisions that, looked at objectively, are so devoid of any plausible justification that no reasonable body of persons could have reached them. I cannot see in the matter before us that the Registrar has failed to exercise his discretion within this constraint. Now if the Registrar had sought to foist a gaggle of goblins on to a union of saints, then Lucifer or the archangles might well have had a justifiable complaint, but who could expostulate if it had been a posse of pixies instead?

It is not necessary in the circumstances to go at any length into the nature of the appellant's business as Mr. Kulasegaran has sought to do, but I would only refer to a decision of the House of Lords to show that the opinion of the Registrar in this case was wholly justified. In *Carter v. Bradbeer* [1975] 1 WLR 1204; 3 All ER 158; 61 Cr App R275 the defendant was the holder of a justices' on-licence and a music, singing and dancing licence for a club to which a special hours certificate applied to the whole of the premises. The club premises consisted of two floors on each of which there was a large room with a dancing area with tables and chairs and a counter from which intoxicating liquour was served. One floor also

had a counter for serving food which could be consumed on either floor. Music was played but there was only occasional dancing and the sale of food was minimal. The main activity which took place at the club was the consumption of intoxicating liquour. The defendant was charged and convicted on eight counts of selling intoxicating liquour after the permitted hours. The question that arose was which part of the premises constituted the 'bar'. The House of Lords held the word 'bar' in the relevant statute had more than one meaning and might denote (a) a counter over which drink was served or (b) the room containing the counter, and further the definition of 'bar' in another section of the statute extended that word so as to comprehend not only what in ordinary parlance would be described as a bar but also a place which was exclusively or mainly used for the sale and consumption of intoxicating liquour, whether or not it contained a bar counter. Accordingly four of the Law Lords held that the counters were 'bars', and alternatively one of them held that the rooms on each floor were bars.

The Registrar in the instant appeal affirmed he 'was satisfied that the major business of the (appellant) is the operation of a bar and therefore it comes within the scope of r. 3 of the Rules of the second respondent', and this is substantiated by the two affidavits affirmed by the Selangor branch secretary of the second respondent. It might well therefore be, in the light of this and the decision in *Carter v. Bradbeer*, that even if the appellant was accorded a hearing on this aspect as he claims he was entitled to, it would have made no difference. I would refer in this regard to my judgment in *Merdeka University* (at p. 212):

> In *Malloch v. Aberdeen Corporation* [1971] 1 WLR 1578 Lord Reid (at p. 1582) thought that if it could be clearly demonstrated that whatever the appellant in that case said could make no difference, that `might be a good answer', and Lord Wilberforce said (at p. 1595):
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> > A breach of procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the Courts, unless behind it there is something of substance which has been lost by the failure. The Court does not act in vain. This seems to imply that the discretion to refuse a remedy may be exercised when the Court judges that natural justice would make no difference or that there was no prejudice.

In *Cinnamond & Ors. v. British Airports Authority* [1980] 1 WLR 582 Brandon LJ said in his judgment in the English Court of Appeal (at p. 593) that the plaintiffs in that case could not complain of not having an opportunity would have availed them nothing and they were not prejudiced thereby, expressly relying on and adopting what was said by Lord Reid and Lord Wilberforce in *Malloch v. Aberdeen Corporation* which I referred to and cited in *Merdeka University.*

I therefore find that the first point taken for the appellant in relation to the eligibility of the appellant's employees for membership in the second respondent is wholly devoid of any merit or substance whatsoever.

The other two grounds taken by Mr. Kulasegaran, namely, non-compliance with para. 4(1)(c) of the Regulations and failure of natural justice, appear to me to be so interlinked and inosculated that they can and should be considered together. Mr.Kulasegaran submits that the amendments effected in 1980 and the enactment of the Regulations has changed the situation to such an extent that the decision in *Pahang Omnibus* is distinguishable. I must wholly dissent from any such proposition. Paragraph 4(1)(c) of the Regulations empowers the Director General in carrying out his functions under Part III of the Act (which relates to the recognition and scope of representation of trade unions) to request the Registrar to ascertain and inform him as to whether or not the workmen in respect of whom the claim for

recognition is made are members of the trade union making the claim. This paragraph is only a procedural provision to implement the substantive provisions enacted in s. 9(4B) of the Act which I have already referred to and set out earlier. The substantive provision of s. 9 of the Act enable the director general to refer to the Registrar for his decision any question on the competence or scope of union representation. Surely when the Director General in exercising his powers under the Act and the regulations refers the matter to the Registrar, the Registrar must ascertain before he decides any question of competence under s. 9(4B) of the Act. Mr.Kulasegaran complains that in the circumstances of this case the Registrar has failed to ascertain, and in answer to a specific question from me purports to advance the astounding proposition that it is possible to decide without ascertaining! I need do no more than indicate his reply, as merely stating it suffices *ex visceribus* to evince its intrinsic inanity.

The examination of the claim for and decision on recognition of the second respondent in this matter reveals virtually a repetition of what occurred in *Pahang Omnibus* in respect of the sins of omission alleged to have been committed by the Registrar and the various steps suggested that he should have taken in the process of deciding the issue. The affidavits of the director-general, the deputy Registrar of Trade Unions, who was the acting Registrar at the material time, and the first respondent all disclose that the latter has acted fairly, properly and reasonably in the exercise of his broad discretion in the matter under s. 9(5) of the Act and has taken all relevant matters into consideration and had sufficient evidence and material before him for the purposes of arriving at his examining the several points taken in this regard on behalf of the appellant as this would merely be a reduplication of the judgment in *Pahang Omnibus.* Section 9(6) of the Act furthermore postulates a privative clause to the effect that the decision of the first respondent under subsection (5) shall be final and shall not be questioned in any Court. This clause is of course ineffective as regards jurisdictional review but there is no jurisdictional error of any kind whatsoever at all in this case.

In the event and for the reasons I have given, at the conclusion of argument the learned Chief Justice, Malaya and I dismissed this appeal with costs. The deposit in Court will be paid out to the first respondent to account of his taxed costs, and I should perhaps observe that the costs of the first respondent both here and in the Court below will of course be carried on a solicitor and client basis pursuant to the provisions of s. 2(b) of the Public Authorities Protection Act 1948 a case of *Pahang Omnibus* all over again!

George Seah SCJ:

The facts relevant to this appeal may be stated shortly.

The 2nd respondents, Kesatuan Kebangsaan Pekerja-Pekerja Hotel, bar dan restoren Semenanjung Malaysia or National Union of Hotel, bar and restaurant Workers, Peninsular Malaysia are a registered trade union, and the appellant, Tanjong Jaga Sdn. Bhd. is a limited company trading under the style of Shangri-la Nite club. On 18 August 1983 the 2nd respondents made a claim to the appellant for general recognition pursuant to s. 9(2) of the Industrial Relations Act 1967 (as amended) (hereinafter referred to as the Act). The appellant did not accord recognition and on 6 September 1983 they wrote to the director-general of Industrial Relations attached to the Department of Industrial Relations, Malaysia (hereinafter called the director-general) for certain particulars. The director-general declined to supply the information asked for but instead directed the appellant to furnish to him a list of their employees as at 18 August 1983. This was complied with by the appellant on 23 September 1983 Meanwhile, the 2nd respondents reported the matter to the director-general under s. 9(4) of the Act after failing to receive any response from the appellant. To try to resolve the matter the director-general requested the Registrar of Trade Unions (hereinafter called

the acting Registrar) on 3 October 1983 to carry out a membership check pursuant to reg. 4(1)(c) of the Industrial Relations Regulations 1980. After scrutinising the application forms, receipt books, minutes book and membership register, the acting Registrar stated that the examination disclosed that 65.8% of the workmen employed by the appellant were members of the 2nd respondents as on 18 August 1983. In computing this percentage, the acting Registrar did not take into account the change (if any) in the number of members after 18 August 1983 because for the purpose of recognition, he stated that only the number of members as at the date of the claim is relevant. This result was conveyed to the Director-General on 1 November 1983, who in turn informed the appellant. When recognition was still not accorded by the appellant the director-general notified the Minister of Labour on 27 January 1984 pursuant to s. 9(4C) of the Act. After having carefully considered the reports of the director-general and the acting Registrar of Trade Unions, the Minister decided on 3 April 1984 pursuant to s. 9(5) of the Act that the appellant should accord recognition to the 2nd respondents. This was duly conveyed to the appellant on 5 April 1984. Since a decision of the Minister under sub-section 5 of s. 9 of the Act that shall be final and shall not be questioned in any Court, the appellant applied for and was given leave by a Judge of the High Court to issue a *certiorari* to quash the decision of the Minister on the ground that it was a nullity (see *South East Asia Firebricks* case [1980] 2 MLJ 165). After hearing the application the learned Judge dismissed the originating motion hence this appeal to the Supreme Court.

The first point taken by learned Counsel for the appellant was that in carrying out the membership check under reg. 4(1)(c) of the Industrial Relations Regulations 1980, which came into force on 15 September 1980, the acting Registrar failed to comply with the rules of natural justice in that firstly, he refused to given an opportunity to the appellant to examine the documents submitted to him by the 2nd respondents and secondly, he failed to give to the appellant a chance to be heard. In my opinion, this submission had been dealt with by the then Federal Court in the case of *Pahang South Union Omnibus Co. Ltd. v. Minister of Labour & Manpower & Anor*. [1981] CLJ (Rep) 74. I would respectfully agree with this decision. This ground therefore fails. It seems to me that the function of the Registrar of Trade Unions under reg. 4(1)(c) of the Industrial Relations Regulations 1980 is to verify the membership register of the union claiming for recognition and to report the result of his finding to the director-general of the Department of Industrial Relations. It is doubtful whether he is required to make any decision under the sub-paragraph.

The other point argued by learned Counsel for the appellant was that the 1st respondent, the Minister of Labour, failed to consider and/or to decide whether the employees of the appellant were eligible to become members of the 2nd respondents in view of the fact that the appellant was operating a night-club and not a hotel, bar or restaurant. In my opinion, that is the nub of the appellant's case.

Now, it was not in dispute that the director-general requested the acting Registrar to carry out a membership check of the 2nd respondents under reg.4(1)(c) of the Industrial Relations Regulations 1980. Instead of confining himself to this matter the acting Registrar proceeded to deal and decide some question which was not remitted to him for his determination, *viz.* the issue which formed the subject-matter of the second ground of appeal. This was what the acting Registrar said in para. 2 of his affidavit:

> After a visit to the Shangri-la Nite club, I ascertained that It was a bar-cum-night-club and its workmen apart from those excluded under s. 9(1) of the Industrial Relations Act 1967 came within the ambit of r. 3 of the Rules of the second respondents.

In deciding this question it was plain that the acting Registrar did not comply with the requirements of natural justice.

In the case of *Board of Education v. Rice* [1911] AC 179 @ 182 Lord Loreburn LC said:

> Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view ... The appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by *mandamus or certiorari.*

This passage appears to have been approved by the House of Lords in *Local Government Board v. Arlidge* [1915] AC 120.

In the earlier case of *Spackman v. Plumstead Board of Works* [1885] 10 App Cas 229 the question raised was whether the certificate of the superintendent architect was conclusive in fixing the general line of building under the Metropolis Management Act 1862 and Lord Selborne said at p. 240:

> No doubt in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a Judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their views.

The general tests have been adopted and followed by me in the *case of Wong Ah Suan v. Sarawak Electricity Supply Corp.* [1982] CLJ (Rep) 50. I see no valid reason to depart from this view and would apply it whenever the Registrar of Trade Unions had been requested to make a decision under s. 9(4B)(b) of the Act on the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom recognition was sought to be accorded.

In *Anisminic v. Foreign Compensation Commission* [1969] 2 AC 147 @ 171 Lord Reid expressed the opinion that a decision made or given in contravention of the rules of natural justice would be a nullity. His Lordship was also of the view that a decision would be null and void if in perfectly good faith the officer had misconstrued the provisions giving him the power to act so that he failed to deal with the question remitted to him and decided some question which was not so remitted. Applying this test to the facts of this case, in my opinion, the purported decision of the acting Registrar that the employees of the appellant (except those employed in managerial, executive, confidential or security capacity) were eligible to become members under r. 3 of the 2nd respondents' constitution was a nullity in that firstly, the acting Registrar decided a question which was not remitted to him for his decision and the appellant had no notice that the acting Registrar would be dealing with this question. Secondly, in purporting to make this ruling, the acting Registrar had failed to observe the principles of natural justice.

Now, when the 1st respondent decided that recognition be accorded to the 2nd respondents by the appellant pursuant to s. 9(5) of the Act the Minister of Labour stated in his affidavit that "My decision under the said section is made only after careful consideration of all the reports of both the Director-General of Industrial Relations and the acting Registrar of Trade Unions." In my opinion, before the Minister had jurisdiction to make a decision or Order under s. 9(5) of the Act he must first of all be satisfied that the 2nd respondents were competent to represent that class of workmen in the employment of the appellant, that is to say, that the particular class of workmen were eligible to apply and to become members under r. 3 of the constitution of the 2nd respondents. Until this important question had been properly resolved by the acting Registrar, in my opinion, any membership check pursuant to reg. 4(1)(c) of the Industrial Relations Regulations 1980 would be an exercise of futility. It would be like putting the cart before the horse.

Since the report of the acting Registrar had played a material part in the Minister's decision dated 3 April 1984 directing the appellant to accord recognition to the 2nd respondents and since, in my opinion, the Minister had no jurisdiction to make the decision or Order under s. 9(5) of the Industrial Relations Act 1967 (as amended) until he was satisfied that the 2nd respondents were legally competent to represent that class of workmen in the employ of the appellant (see *Inchcape (M) Holdings Bhd. v. Gray* [1985] CLJ (Rep) 132), I am constrained to hold that the purported decision or Order of the 1st respondent was a nullity (*Maradana Mosque Trustees v. Mahmud* [1967] 1 AC 13).

Reference was made to a *dictum* of Lord Wilberforce in the case of *Malloch v. Aberdeen Corp.* [1971] 1 WLR 1579 @ 1595 which reads:

> A breach of procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the Courts, unless behind it there is something of substance which has been lost by the failure. The Court does not act in vain.

Lord Scarman discussed this dictum in the Privy Council in the case of *Wong Ah Suan v. Sarawak Electricity Supply Corp.* (*supra*) and at p. 57 His Lordship said:

> Their Lordships think it impossible on the facts of this case to know what the Governor-in-Council would have decided, had the plaintiff been given an opportunity to develop orally or in writing his full case before the decision was taken. It cannot be said with any certainty that the decision would have been the same.

In other words, the *dictum* only applies in clear and obvious cases and the observations of Lord Scarman, in my opinion, aptly apply to the facts of this case.

For the above reasons, I would issue an order of *certiorari* in terms of the originating motion. The appeal would therefore be allowed with costs here and below.

Also found at [1987] 2 CLJ 119